PORNOGRAPHY AND THE LAW: REDRESSING THE HARM

Is censorship the solution to the problem of pornography? Many feminists think so. So do the moralists. Civil libertarians say no.

But what is the problem of pornography? Feminists see pornography as expressing misogyny in its worst forms; it eroticizes male dominance and female submission, male potency and female victimization. There is little disagreement among feminists that pornography expresses male fantasies, provides an outlet and a platform for the venting of male rage at women, and encourages men to act out their fantasies in the manner portrayed. Although pornography is not the source of male rage against women, it is an expression of that rage, and like all the media, it has a profound effect on behaviour.

For moralists, the problem is any representation of sex or nudity. In contrast to feminists, they view the submission of women to men as natural and proper, but their focus is on the submission of women to the authority of their husbands. This is because moralists are concerned about the breakdown of the family, the blurring of sex roles and the increase in sexual permissiveness. In the universe of the moralists, the only role for women is as chaste wives and mothers; the only place for sex and nudity is within marriage, for the purpose of procreation. And women should never enjoy sex; if they do they are whores. Thus, moralists see pornography as advocating that sex be enjoyed for its own sake, that people indulge in sexual activity outside of the marital institution, and that women passionately pursue sexual pleasure. The fear of moralists

is that sexual activity and sexual depravity will increase as a result.

Thus moralists object to descriptions of images of nakedness, of sex. They object to the presentation of erotic images and ideas. What feminists object to is material which sexually stimulates the viewer or reader by the portrayal of the submission of women to men.

Much of the discusssion of the legal solution to pornography is centred on isolating pornography from the images of women which are projected into public and private consciousness through the media and the arts. Feminists and moralists alike point to the violence of hard-core pornography as the basis for this isolation. But there are also dramatic similarities in the images of women presented in the media and the arts. Only by analyzing both the differences and the similarities in these images can we understand the harm caused by pornography and develop solutions.

WHAT IS THE HARM?

There are certain elements in the representations of women which are pervasive in all forms of the visual media and arts, whether "pornographic" or not. Submission and availability are suggested through the postures in which women are presented; women are portrayed as passive and powerless, as ready victims. An additional common element is the fragmentations of women into body parts; certain parts of the female body are sexualized and isolated from the rest of the body. We often see pictures which contain only the breasts or legs of a woman, for instance, or where the whole of a woman's body is presented, but the focus is on the breasts.

Therefore, all the media and the visual arts contain images of women as sexualized bodies available for submission to the will of men.

Although the most horrifying and violent images of women as objects are to be found in the multi-million dollar pornography industry, and although men are consumers of this material, it is also true that there is a multi-million dollar industry which sells to women the same objectified images of themselves, sexualized or desexualized to varying degrees. The heroine in romantic novels is passive, powerless, a chaste victim without sexual desire; the only way she would have sex is if she were forced through violence or duty in marriage. The Cosmopolitan woman, on the other hand, thinks of sex constantly. The "Cosmo girl" is the quintessential sexual object who pleases and satisfies men and goes after sex by being available and looking sexy, not by being direct and honest about her sexual feelings and needs. Like the romantic heroine, however, the Cosmo girl is from a blue collar or lower middle class background and longs to leave her job as a secretary or nurse to be swept off her feet by a heroic, virile male who is a doctor, lawyer or millionaire. Marriage is the longed for destiny. Vogue, on the other hand, presents women as eroticized clothes-hangers - skinny, ethereal creatures - alluring, unreachable and very upper class. Professsional women read Vogue to learn how to retain their feminity as they attempt to march up the corporate ladder.

The media directed expressly at women are fundamental to women's acquiescence to a status as sexual objects, as human beings who have no power in the world and need men to look after them, and as victims of violence at the hands of men. This inculcation is the necessary complement to the inculcation men

receive through "men's magazines" and video pornography.

The message of these two industries - one directed at women, the other at men - is reinforced by all the visual media (including soft- and hard-core pornography)and the arts. The mere visual presentation of a woman has come to be associated with sexual activity and women are reduced from human beings to objects for the ready sexual consumption of men.

Sexual stereotypes are reinforced by all the media and arts. For instance, depending on their class background and education, women want to look like the submissive models on the pages of Cosmopolitan or Vogue, and they want to be as they imagine these models are. Men want to be the dominant male who can possess a woman like the models on these pages.

This presentation of women of sexuality also reinforces rape myths. Rape myths require that women be innately passive and submissive, but desirous of rape because they are unable to express their sexual needs in a forthright manner. The mythology of rape is that women will express their desire for sex by appearing "sexy", by being available and inviting the sexual aggression of men so that they can blame men for their sexual activity.

The objectification of women and the reinforcement of rape myths and sexual stereotypes legitimates violence against women and may not only encourage this violence but cause it. However, the latter is very difficult to prove, given the complexity of sexual development and gender socialization.

Because it eroticizes violence and portrays women as desiring violent sexual contact with men, hard-core pornography seems to be more harmful to women. But hard-core porn lacks public legitimacy. What makes hard-core pronography exciting to its consumers - its private, violent and illegitimate nature - is precisely what reduces its power in the public consciousness.

On the other hand, the mainstream media, soft porn (which is almost mainstream now) and the arts are legitimate contexts. They are legitimate because they are pervasive and public, and because they are an absolutely accepted part of our environment. This is the way we publicly celebrate sexuality. So powerful are the images projected by the mainstream media and arts that we do not even notice their presence and their influence on us. These contexts legimate the sexual objectification of women in a way which is not possible for hard-core pornography.

Therefore, we make an error in pointing the finger only at hard-core pornography. The images of women found in <u>all</u> the media and art forms are harmful, not only because they inculcate a deeply sexist notion of female and male sexuality, but because this notion of sexuality is at the foundation of the inequality between women and men. It is not possible for women to develop as full human beings given their pervasive reduction to sexual bodies. But this is not the kind of harm which the law recognizes.

THE HARM RECOGNIZED BY LAW

The criminal law deals with pornography by setting out a vague definition of obscenity which focuses on the undue exploitation of sex or the combination

of sex and violence. What is unacceptable is based on the community standard of tolerance - one which is national and contemporary, which doesn't cater to one segment of the population - sophisticated, puritannical, raunchy or depraved as it might be. Also to be considered is whether the material is art and whether the purpose of the maker of the material is the "base exploitation" of sex.

In deciding what is obscene, the judge is supposed to be objective. However, this is impossible; no clear indicia of obscenity are set out in the Criminal Code or in the decisions of the courts. As the newly-appointed Chief Justice of the Supreme Court of Canada, Brian Dickson, stated in a 1970 Manitoba Court of Appeal judgment:

> "It is sometimes difficult to draw a line between that which is obscene and that which is not. It is not unlike having to draw a line between night and day. There is dusk."

In spite of the resulting uncertainty as to how to determine what is obscene, in spite of the fact that the criteria are, in reality, subjective, the vagueness of the definition is considered necessary for the law of obscenity to keep pace with changing community standards.

The subjective views of judges are definitive because the Crown need not call expert witnesses as to artistic merit or purpose or as to community standards, and not need provide opinion surveys as to what people will tolerate. Therefore, often judges decide what is obscene merely by viewing the material or performance which is alleged to be obscene.

This means that literally anything can be found obscene if there is a reference to sex. The Supreme Court of Canada found Lawrence's Lady Chatterley's Lover was not obscene in 1962; however, four of the nine judges thought the book was obscene. In 1977, the highest court in the land found sex devices to be obscene and made reference to the fact that these devices were for "unnatural sexual practices".

Thus, there is no way a defendant charged with an obscenity offence can know he or she has broken the law until after the conviction. The fact that imported materials or films have been allowed into Canada and not been found immoral or indecent under the Customs Tarrif Act, the fact that one or more provincial censor boards has allowed a film to be shown publicly, do not provide any defence; in fact, that may not even be considered relevant.

It is also unclear that the criminal law is supposed to govern only public behaviour and publicly shown materials and performances. Private behaviour and privately consumed materials may also be within the jurisdiction of the criminal law regarding obscenity.

Although no explicit purpose is set out in the criminal law, the law enforces a view of morality which focuses on the prevention of sexual depravity. The voice of the courts is the voice of the moralists. The courts don't like to see people engaging in "unnatural sexual practices" which are not for the purpose of procreation; they are concerned about

the breakdown in the family and in traditional sexual morality. They are afraid that certain materials, films and performances will make the consumers of pornography think evil thoughts, that it will corrupt their morals. In other words, the courts are afraid that pornography will harm the consumers of pornography. But who are the consumers? Almost all are men. The courts don't refer to this and yet their underlying concern is harm to men.

To a very limited extent there is concern for whether children will be harmed by their exposure to obscene materials; however, there is no concern that women will be harmed by exposure to the materials, that they will feel reduced, self-conscious, embarrassed and even violated at seeing someone of their sex presented in a submissive and dehumanized manner. And there is no concern that pornography harms women in the many other ways referred to earlier.

The Criminal Code sets out a method of prohibiting certain types of material and behaviour and allows intervention only after impugned materials have been exposed, or the performance has been given, in public (and perhaps in private). The provincial censor boards, on the other hand, regulate the viewing of films and videotapes shown publicly through classification, and in Ontario the board can prohibit the public showing of films and videos or order that certain parts of a film or video be cut out. The restraint imposed by the board occurs prior to any public exposure. This means that we are not in a position to judge material censored by the board. We will simply never see this material.

But the Ontario board also upholds the view of the moralists. Like the courts, the members of the board wish to uphold traditional patriarchal values, including female and male stereotypes and the double standard of sexuality. Thus, they allow full frontal nudity of women and not of men, and like the courts, they object to the showing of an erect male penis. But they have no objections to films which portray women as whorish teasers of men who are appropriate targets of male contempt and hostility. On the other hand, they view with jaundiced eyes films which put the traditional family into question and abhor the showing of incest and non-procreative sexuality no matter what the context. They are not concerned about whether a film creates sexual stimulation by combining sex and violence or by portraying women as submissive to men.

Therefore, we get to see the James Bond series, Clockwork Orange, Looking for Mr. Goodbar, the Texas Chainsaw Massacre and Porky's. We do not get to see Not a Love Story or Luna.

What it comes down to is this: The harm addressed by the Ontario Censor Board is the same as that addressed by the courts: The explicit concern is the moral fabric, which the Board and the courts find housed in the minds of male consumers. The implicit concern is a presentation of sexuality which upholds gender inequality. And the net of the censors is widening. Soon the Supreme Court of Canada will discuss the issue of whether materials consumed in private and not publicly available will be caught by the Criminal Code. The Ontario government is now talking about widening the jurisdiction of the Ontario Censor Board to include videotapes which are privately consumed.

Classification of both films and videotapes by the Board makes sense. Censorship by the courts and the Board of the purely private consumption of materials is questionable. But this widening of the Ontario Board's jurisdiction should be of greater concern to us because the restraint imposed by the Board occurs even before a consumer can see the videotape. Already the courts have put into question the censoring power of the Ontario Board and the Ontario government is trying to draft guidelines specific enough to meet the requirements of the courts when limits are imposed on freedom of expression.

Constitutional challenges have also been made to the municipal authority to regulate businesses which provide "adult entertainment", that is, goods and services which appeal to sexual or erotic appetites. Municipalities have used this power to control massage parlours and the manner of display of pornographic magazines, as well as to prohibit the exposure in taverns and restaurants of the pubic area of dancers, waiters and waitresses and the breasts of waitresses. Businesses governed by these by-laws claim their right to freedom of expression is curtailed. They also claim that the by-laws really deal with obscenity and therefore are invalid because they conflict with criminal legislation. But the courts have upheld most of the by-laws and have indicated that freedom of expression does not include the freedom to expose female pubic areas in order to sell liquor, leaving open the question of whether it includes this type of exposure for other purposes.

The power of Ontario cities to pass these by-laws is a recent one and it is difficult to know what type of harm is being addressed, since the court decisions deal with technical matters of provincial-federal jurisdiction and vagueness in the by-laws. It remains to be seen whether arguments based on the Charter of Rights and Freedoms will assist in clarifying the intent of municipal governing adult entertainment businesses.

Otherwise, the concern of our laws is that sex is dirty and depictions can twist the minds of men. There is scant recognition that the minds and hearts of women have any place in the deliberations of the courts and tribunals which censor what we see.

SOLUTIONS - LEGAL AND POLITICAL

Feminists are asking themselves whether it is possible to construct a law which has as a main concern the effect pornography has on women. Some think that a change in the definition of obscenity would create a change in the focus of the courts. Others have suggested a new Criminal Code section dealing with pornography, rather than obscenity, and have set out a definition of pornography which is long, complex and detailed.

It is difficult to imagine a precise and workable definition of obscenity or pornography; but even if the law could accurately define what the harm is in terms and concepts which fit in with legal tradition, how could this harm be proven in the traditional legal sense, given that the question of

what is obscene or pornographic is highly subjective? And of course this begs the question: Who decides what is obscene? Who decides what is pornographic?

Most judges are elderly men, from upper-middle class backgrounds, who are white, Anglo-Saxon and Protestant. They see life from this perspective and make their judgments from this perspective. It is a rare court decision which does not reflect the interests of those in power and uphold the status quo.

In addition, the whole of the common law is based on the principle that what has been said before by another court is correct; the higher the court the better, and rarely do judges look behind the obvious statements of the law enunciated in earlier decisions. They do not question the logic of the reasoning or the interests protected. Therefore, we can count on the old law having a dramatic influence on any new Criminal Code provision.

A new definition of the offence is not the answer. If the criminal law does deter criminals, there is no deterrent effect when the law is complex and subjective and it is impossible for citizens to avoid committing the offence because they don't and can't know what the offence actually is. We will be forced to rely on a beefed up pornography squad to stamp out pornography, an unpleasant prospect when we consider how gargantuan the state policing and prosecutorial machinery is becoming.

In any event, there can be no deterrent effect when we live in a society which tacitly approves violence against women and turns a blind eye to the

objectification of women in our everyday environment. More and longer jail terms have not stamped out drunken driving because drunken driving is accepted in our society; censorship will not stamp out pornography because misogyny is accepted.

Censorship is not effective to deal with the harm to women for an additional reason: The media portrayal of women is both a symptom and symbol of a far greater problem. Pornography gives us an idea of the unconscious view which men hold of women and of the nature of their fantasies of power over women. It is therefore of importance in understanding the relationship between the sexes and how to confront the difficulties between women and men. It is also important for women to have access to these fantasies so that collectively they can create solutions which reflect their viewpoint.

An attempt to wipe out the expression of the misogynous view of women found in pornography, even in only its worst forms, will merely drive pornography underground. Pornography will continue to be produced and viewed and an increase in its forbidden nature will increase its appeal. Even if the production and distribution of pornography are reduced, the male rage at women which is expressed in pornography will remain and perhaps find a more concrete outlet.

It is for these same reasons that censorship by means of provincial human rights legislation is not appropriate. Both Manitoba and Saskatchewan have legislation which deals with degrading public representations of specific groups, one of which is women. Certainly, this legislation is an improvement

over attempts to deal with pornography by means of the criminal law, because a wide range of remedies and methods of resolution other than adjudication are available. However, it is not clear that the legislation as presently constructed in either province could be used to deal with pornography. Both provinces require that the representation expose women to hatred; Saskatchewan has an alternate requirement that the material affront the dignity of women. Like the Criminal Code provisions regarding obscenity, these are vague criteria. Neither requirement can be proved; both are a matter of opinion.

But the law can be utilized in two ways: First, to regulate the public exposure and availability of pornography, and second, to transform the nature of the images of women presented in the media.

Municipal by-laws are useful because they can be used to address the fact that pornography is forced on people while they are walking down the streets, when they go to the corner store for bread, or to the bookstore or videostore. Restrictions on advertisements and signs for adult entertainment businesses as well as on the display of porn magazines and videos can be used to deal with the harm to women. Having to view degrading representations of women reinforces for both sexes the most negative of sexual stereotypes, and it is particularly upsetting to women.

The criminal law notion of a Canadian standard of tolerance regarding pornography is untenable; ideas of what is acceptable vary dramatically between Victoria, Estevan, Montreal and Halifax. But each city can express

its tolerance level through by-laws and community members can directly affect the content of by-laws through lobbying city hall politicians and attendance at municipal board hearings.

Zoning by-laws can be formulated to control the location of adult entertainment businesses and to see that the number of these businesses in each city ward is kept under control so that poorer areas are not overwhelmed and stigmatized.

A second focus for legislative action is the presentation of women in the media. We need affirmative action.

The media should be the mouthpiece of society as well as the mirror. Therefore, they must give women, real women, a voice. This means a greater percentage of female announcers on radio and television stations, a greater emphasis on creative content by women, and in particular, a concern that the artistic endeavours of women make up 50% of the presentations on television and radio.

Because the media are also a mirror, they should portray women as they really are: few women are unintelligent and gullible, as advertising, in particular, portrays them; they are competent as well as needy, strong as well as vulnerable, ordinary-looking as well as gorgeous. They are not only housewives. They are also secretaries, doctors and bus drivers. There are endless possibilities, since reality presents them to us every day. These artistic endeavours, these varied images of women, these varied female voices, must be presented on prime time television and radio,

however, to have any effect. But the emphasis should be on presenting a wide variety of images of women, rather than outlawing the presentation of sexist images of women.

In 1979, The Canadian Radio-Television and Telecommunications Commission formed the Task Force on Sex-Role Stereotyping to develop guidelines to "encourage the elimination of sex-role stereotyping in the broadcast media". The task force produced a number of recommendations but unfortunately one of them was to allow the broadcasting and advertising industries to regulate themselves for two years. The report, Images of Women, was finally released in 1982, and there is no noticeable change in the presentation of women in the media. Therefore, lobbying of the government, and especially the CRTC, is now called for. The alternatives to self-regulation by the broadcasting and advertising industries are regulation by the CRTC and legislation; both should be considered.

Giving women a voice also requires that women have the money to produce television and radio programs, records, videotapes, films and plays. All levels of government, as well as the Canada Council and other arts-granting institutions, must be pressured to provide this money so that equal time can be given to the female imagination.

In general, education and discussion is the key, and there is much work to be done in discussing the issues of sexism in the media and pornography with churches, unions, men's clubs, women's groups of whatever stripe and interest, business and professional organizations (especially teachers), social work agencies, and community groups. Of particular concern are the

boards of education, the police, the advertising and media industries and members of the artistic community.

Boycotts are also powerful tools: The advertising industry must be made aware that we can organize boycotts of products where advertising is presented in a way which demeans women or in a magazine or format which demeans women. Boycotts of businesses carrying offensive materials or presenting offensive entertainment or services can also be organized.

CONCLUSION

Looking at pornography as an isolated issue does not allow for a clear identification of either the harm caused by pornography or how to prevent and compensate the harm. By presuming a legal solution based on prohibition we define the problem in a narrow manner which prevents a full consideration of issues not dealt with by the law; we also transfer our political and social responsibility to the state, and the state is not neutral.

We have to know how pornography fits in with other media presentations of women and also why the porn industry exists at all. Why do men buy the stuff? What does it show about us as a society that so many men regularly read hard and soft-core pornography and watch pornography in film theatres and on videos in their home? We will not answer these questions if we spend our time trying to drive pornography underground by using the law.

Pornography is fantasy, but it is also an expression of male rage at women. This rage exists and presently finds an outlet in a huge industry which spans the world. Whether pornography causes men to act out rage at women,

is, therefore, not the only concern.

Pornography tells us something about our society. To drive it underground through the use of the law is to ignore it. And we ignore it, as a society, at our peril.